

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
2001 OAL Determination No. 4

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SECRETARY OF STATE

April 11, 2001

Requested by: JAMALL BAKER

Concerning: CALIFORNIA DEPARTMENT OF CORRECTIONS – Policy of Treating Juvenile Adjudications as Prior Convictions and Considering Offenses for Which the Inmate was Charged but Never Convicted as the Equivalent of a Conviction for the Purpose of Determining an Inmate’s Classification Score

**Determination issued pursuant to Government Code Section 11340.5;
California Code of Regulations, Title 1, Section 121 et seq.**

ISSUE

For the purpose of determining an inmate’s classification score, does the Department of Corrections’ policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction constitute a “regulation” that is required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act? ¹

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1. This request for determination was filed by Jamall Baker, #P-01541, CTF-Soledad-LB 351, P.O. Box 705, Soledad, CA, 93960-0689. The California Department of Corrections’ response was filed by E. A. Mitchell, Interim Assistant Director, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 99-024. This determination may be cited as “**2001 OAL Determination No. 4.**”

CONCLUSION

For the purpose of determining an inmate's classification score, the Department of Corrections' policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction constitutes a "regulation," and is required to be adopted and codified pursuant to the rulemaking procedures of the Administrative Procedure Act.

BACKGROUND AND ANALYSIS

At the time of this determination request, Mr. Jamall Baker was incarcerated in the Correctional Training Facility at Soledad for the offense of first degree burglary. He was separately charged with "assault with firearm on person" and "false imprisonment with violence" in connection with the burglary, but these charges were dropped as part of a plea bargain. As a juvenile, Mr. Baker also was adjudicated guilty of assault with a deadly weapon.

According to Mr. Baker, he was precluded from placement at a minimum security facility due to his juvenile record and the fact that he had been *charged* with the use of a firearm in connection with the first degree burglary. The three-letter code "VIO" was assigned to Mr. Baker, indicating that he has a prior or current *conviction* of a violent felony. Departmental officials may use the "VIO" code to override the placement of an inmate at a facility according to the inmate's classification score. Mr. Baker, who has no prior or current conviction of a violent felony, challenged the "VIO" assignment by filing an administrative appeal that was ultimately resolved against his favor.

Mr. Baker now seeks a regulatory determination whether the Department of Corrections' ("Department") classification policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction constitutes a "regulation," and is required to be adopted and codified pursuant to the rulemaking procedures of the Administrative Procedure Act (Chapter 3.5, Division 3, Title 2, Government Code (commencing with Section 11340); hereafter, "APA").²

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2. A similar request was submitted by Frank Gutierrez, E87109 D7-37L, P.O. Box 690, Soledad, CA 93960-0690. Mr. Gutierrez challenged the Department's alleged practice of treating a finding of good cause in a parole revocation hearing the same as a "conviction" for the purpose of assigning the classification known as an "R" suffix as an inmate's

A determination of whether the Department's policy is a "regulation" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged policy is a "regulation" within the meaning of Government Code section 11342.600, and (3) whether the challenged policy falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations*, (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11340.9, 11342.520, 11346.) Moreover, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.)

Penal Code section 5054 provides that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In this connection, Penal Code section 5058, subdivision (a), states in part as follows:

custody designation. (See tit. 15, CCR, sec. 3377.1(b) (an "R" suffix shall be designated for any inmate who was convicted of, or whose commitment offense includes an act equivalent to specific sex offenses listed in the section).) Mr. Gutierrez stated in his request that the Department affixed an "R" suffix to his custody designation in May 1999 due to a 1993 parole violation pursuant to the challenged policy as it appeared in a 1994 memorandum by the Department. However, it is unclear if this policy still exists. (See discussion regarding the Enhanced Tracking System (ETS) Pilot Program, *infra*, at pages 9-10.) Without additional information or evidence, it is difficult for OAL to determine whether the "R" suffix was placed on Mr. Gutierrez's custody designation in May 1999 because of the policy contained in the 1994 memorandum or based on facts and the law as stated in Title 15, CCR, section 3377.1(b), and therefore, we refrain at this time from making a determination pursuant to Mr. Gutierrez's request.

“The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations shall be promulgated and filed pursuant to [the APA]”

Thus, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

“(a) No state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[’] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

Government Code section 11342.600, defines “regulation” as follows:

“. . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a “statutory scheme which the Legislature has [already] established” But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations” (*Ibid.*)

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot be legally “embellished upon.” For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be

supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation. Thus, statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342.600, a rule is a “regulation” for these purposes if (a) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (b) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency policy to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

There is no indication that the Department’s policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction for the purpose of determining an inmate’s classification score is limited in application to Mr. Baker, but rather that such a policy is of general application throughout the Department.

As manager of the state prisons, the Director of Corrections is charged with the responsibility for the “care, custody, treatment, training, discipline and employment of all prisoners.” (Penal Code section 5054, *supra*.) The Director is required to cause each person who is newly committed to the state prison to be examined, to classify each person on the basis of the examination, and to assign the person “to the institution of the appropriate security level and gender population nearest the prisoner’s home, unless other classification factors make such placement unreasonable.” (Penal Code section 5068.) Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force. (*Id.*)

Pursuant to Penal Code section 5058, *supra*, the Director formally adopted a number of regulations pertaining to inmate classification. Specifically, Title 15, California Code of Regulations (hereafter, "CCR"), section 3375.2, subsection (b), provides as follows:

"(b) The following three-letter codes are used to indicate those administrative determinants which may be imposed by departmental officials to override the placement of an inmate at a facility according to their classification score.

* * * *

"(25) VIO. Inmate has a current or prior conviction for a violent felony, including but not limited to, those listed under Penal Code section 667.5(c), which, as determined by the CSR [Classification Staff Representative], requires placement in a facility with a higher classification level than that indicated by their classification score."

Thus, if the administrative placement condition "VIO" is applied to an inmate based upon a conviction of a violent felony, the inmate is precluded from placement at a minimum security facility.

With respect to inmate placement at certain minimum security facilities, the Department's Administrative Bulletin 91/27 (September 10, 1991, amended March 10, 1992; hereafter AB 91/27), provides as follows:

"Inmates convicted of violent felonies are excluded [from placement at camps and minimum support facilities] except as stipulated in the case-by-case column."

The case-by-case column permits the current custodial facility to consider placement at a camp or minimum support facility when the inmate's underlying offense is, among other things, a property crime (including burglary) "which involved personal use of a weapon wherein no injury was sustained by the victim."³

3. See AB 91/27, dated Sept. 10, 1991, amended Mar. 10, 1992, chart – Camp/Level I MSF, Placement Criteria, p. 2. In this determination, OAL has not addressed the potential issue of whether the placement criteria are themselves uncoded rules subject to the APA. In particular, it is not clear whether the policy of excluding inmates from minimum security facilities because of a conviction of a violent felony is a "regulation" which is subject to

The continuing vitality and broad application of the directives set forth in AB 91/27 are confirmed in a January 27, 1999, memorandum on "Minimum Custody Preclusion Due to Violence:"

"This memorandum is to clarify existing policy regarding a violent felony as a Minimum Custody (Camp/Minimum Support Facility) exclusionary factor. . . . To clarify, a prior conviction for a qualifying violent felony is cause for exclusion.

". . . Administrative Bulletin 91/27 (Amended) states that inmates are excluded if convicted. This phrase means any conviction, not just the current conviction. . . . An inmate with a qualifying violent felony conviction, as noted in Administrative Bulletin 91/27 (Amended), is not eligible for minimum custody placement." [Emphasis in original.]

It is not clear at this stage whether the policies established by AB 91/27 and the Department's January 27, 1999, memorandum are themselves "regulations" that require adoption under the APA. (See footnote 3, *supra*.) However, the Department, in its handling of Mr. Baker's appeal, has further interpreted "conviction," as used in Title 15, CCR, section 3375.2, subsection (b)(25), to include both juvenile adjudications and offenses for which the inmate was charged but never convicted. This appears evident in the Department's March 29, 2000, decision regarding Mr. Baker's appeal:

"It is staff's position that the appellant's exclusion from CCF [Community Correctional Facility], MCCF [Modified Community Correctional Facility], and CCRC [Community Correctional Reentry Center] placement *was not based solely on his juvenile record*. Staff informed the appellant that circumstances *in his commitment offense* as well as his remaining time to serve were considered.

* * * *

"A review of the appellant's criminal history transcript reveals that *charges* in his commitment offense include 'assault with firearm on person' and 'false imprisonment with violence.' *Although he was not convicted of these*

the APA. It may well be that this policy is already covered in existing regulations previously adopted by the Department and printed in the CCR.

charges, they are still permanent exclusionary factors for CCRC placement” [Emphasis added.]

The Department’s policy, as evidenced in the March 29, 2000 decision, of treating juvenile adjudications and offenses for which the inmate was charged but never convicted as “convictions” for classification purposes, interprets, implements, or makes specific Penal Code sections 5054, 5058, and 5068 and Title 15, CCR, section 3375.2, subsection (b).

In its response to this determination request, the Department argues that AB 91/27 “does not provide any criteria for placement in CCFs nor does it speak to the criteria for determining if an inmate has a conviction of a violent felony.”⁴ However, CCF placement criteria, the criteria for determining whether an inmate has a violent felony conviction, and whether any such criteria are being applied correctly, are not at issue in this determination. Rather, the issue at hand is whether the challenged policy of treating a juvenile adjudication or an offense for which the inmate was charged but never convicted as a conviction for the purpose of inmate classification constitutes a “regulation” pursuant to the APA.

Further evidence of a broader Department policy of treating juvenile adjudications and unproven charges as “convictions” for the purpose of inmate classification is provided in a November 1, 1994, Department memorandum pertaining to placement screening for Community Correctional Reentry Centers (CCRCs). It provides in part as follows:

“For the purposes of the ETS [Enhanced Tracking System] Pilot Program and the Minimum Custody Screening Form, *any ‘Sustained’ petition from a juvenile court* or finding of ‘Good Cause’ by the BPT [Board of Prison Terms] or PHD [Parole Hearings Division] will be considered to have the same impact as a conviction in a court of law. In other words, if departmental policy indicates that a conviction for a given offense excludes placement at an MSF or camp, *either of the other stated adjudications will also result in a finding of permanent (P) exclusion.*”⁵ [Emphasis added.]

Thus, if a conviction “for a given offense excludes placement,” then, according to the Department’s 1994 memorandum, so would a juvenile adjudication.⁶

4. Department Response to Request for Determination, Aug. 15, 2000, p. 3.

5. Department of Corrections memorandum, Nov. 1, 1994, p. 2.

6. The Department acknowledges that Welfare & Institutions Code section 203 precludes the use of juvenile adjudications as convictions, but claims Mr. Baker “has not provided

One additional record evidences that the Department is following a policy of considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction. A cryptic comment dated September 1, 1999, from the Classification Staff Representative handling Mr. Baker, provides as follows:

"Comment: Don - Give inmate Baker the attached CCRC [Community Correctional Reentry Center] form that states, based on #4, he is ineligible for CCRC consideration. It is my opinion the response at the informal level of [Mr. Baker's] CDC 602 should have been . . . criteria of CCRC placement is that in the commitment offense [offense currently serving time for] the use or possession of a firearm, [a] conviction or enhancement is not required [and this] precludes one from the CCRC program. Since [Mr. Baker] had a firearm in the I/O, he is precluded. . . ."

Thus, the Department deemed Mr. Baker ineligible for CCRC placement because his commitment offense involved the use of a firearm, even though he was not convicted of that charge.

For these reasons, we conclude that the policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction for the purpose of determining an inmate's classification score constitutes a "regulation," and is subject to the APA unless expressly exempted by statute.

(3) With respect to whether the Department's policy falls within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language." [Emphasis added.]))

No express statutory exemption applies. The Department did, however, refer to the fact that the portion of its November 1, 1994, memorandum pertaining to


information and/or documentation indicating that the regulations as adopted are not being applied correctly." (Department Response to Request for Determination, p. 3.) This determination does not address whether the regulations are being applied correctly and in a manner consistent with the statute, but rather whether the challenged uncodified policy meets the definition of a "regulation" pursuant to the APA.

juvenile court findings related to a pilot program.⁷ Pilot programs utilized by the Department are exempt from the APA provided that specified conditions are met. (See Penal Code section 5058, subdivision (d)(1).) In this case, there is no evidence that these conditions have been satisfied. Moreover, such pilot programs lapse by operation of law after two years unless their rules are formally adopted as regulations pursuant to the APA. (*Id.*) The Department indicates that this program has in fact lapsed. Therefore, this particular APA exemption could not apply to the challenged policy currently being administered by the Department.

Therefore, for the purpose of determining an inmate's classification score, the Department's policy of treating juvenile adjudications as prior convictions and considering offenses for which the inmate was charged but never convicted as the equivalent of a conviction constitutes a "regulation," and is required to be adopted and codified pursuant to the rulemaking procedures of the Administrative Procedure Act.

DATE: April 11, 2001

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7. Department Response to Request for Determination, Aug. 15, 2000, p. 3. See also, Nov. 1, 1994, Memorandum, p. 2.